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NO. 83-915

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARY LAURA BROOKINS, ET AL.,
PETITIONERS,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION,
ET AL.,
AND
UNITED STATES OF AMERICA,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF BEVERLIE J. BECK AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

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INTEREST OF AMICUS CURIAE

Consent to Beverlie J. Beck's filing of this brief as amicus curiae has been obtained from all parties. Copies of letters from the parties' attorneys indicating this consent have been filed with the clerk of this Court.

Beverlie J. Beck is President of the South Bend City Council of which she has been a member for four years. Much of her time on the council has been spent working with and for neighborhood groups. As a member of the City Council she is personally aware of the many years of effort and many dollars of community Development money it took for South Bend to be able to point with pride to its numerous healthy, naturally-integrated neighborhoods which had forgotten about "white flight" many years ago. Ms. Beck built her home and lives in such a neighborhood.

Beverlie Beck is in her twenty-ninth year as an educator in the South Bend public schools. She taught at an integrated neighborhood school which was closed to normal neighborhood use by the desegregation plan embodied in the consent decree entered into by the Justice Department and the South Bend Community

School Corporation.

Beverlie Beck has been interested in integration issues since 1957 when she attended a summer workshop at the University of Notre Dame. She believes in integration. She is not opposed to busing when it is needed. She objects to needless busing, especially when it will only frustrate the goal of achieving integration and seriously undermines the public policy of ending discrimination in housing.

As an elected representative of South Bend, Ms. Beck grieves that what could have been a simple plan for integrating an area of considerable good-will has instead been replaced by a plan which can only prove deadly for her city's growth and expansion. As an educator who believes in integration and as a resident of an integrated neighborhood, she is gravely concerned that a plan was adopted and approved by a federal court which not only

promotes school segregation but promotes residential segregation as well.

Beverlie Beck believes that if the District Court had given Petitioners an opportunity to present their evidence in opposition to the plan, it would not have been approved by the Court.

SUMMARY OF ARGUMENT

Petitioners have been denied their day in court. This result cannot stand unless the procedural due process guaranteed by our Constitution is made a dead letter.

Amicus submits that this case reflects in part the confusion in the lower federal courts as to how to permit and encourage voluntary settlements of desegregation cases while preserving and protecting constitutional requirements and the rights of those adversely affected by but not a party to the settlement. What the Seventh Circuit has done in this case is to totally ignore the fact that a tension exists between

voluntary settlements and the rights and interests of individuals and communities. In ignoring this fact, this circuit not only afforded Petitioners a total lack of due process, it also seriously undermined the value thought to be inherent in a voluntary settlement of a school desegregation case.

Furthermore, this result is in conflict with the law of the Seventh Circuit as well as the law of other Circuits. More importantly, perhaps, the result of this case seriously undercuts the constitutional policy requiring the desegregation of our nation's schools and undermines community efforts, pursuant to federal and local policy, toward ending discrimination in housing, and thereby encouraging integration in residential patterns.

If school integration is truly this country's goal, courts must consider with care the impact a remedy is likely to have

on resegregation. Special care must be taken in the context of voluntary settlements of school desegregation cases which necessarily involve the compromise of civil rights. If voluntary settlements are to provide the benefits courts cite to justify their use, that is, the community cooperation they inspire, standards must be set to ensure that objectors' interests and the interests of the community as a whole are considered by the courts. At the very least, amicus submits, courts must provide an opportunity for objectors to be heard.

Therefore, amicus urges this Court to grant the certiorari petitioned for in this case. Only review by this Court can ensure that no other individuals or communities suffer the egregious wrong done Petitioners and the City of South Bend. Only this Court can ensure that Petitioners get their day in Court.

ARGUMENT

This case represents a new chapter in the area of school desegregation. Nationwide, efforts have moved from the de jure context to the de facto situation, from the South to the North and West, and from court-imposed remedies to voluntarily-settled desegregation plans. Such changes call for a new judicial sensitivity to the unique issues they present. Although the goal is the same--integrated education--the vehicles used for reaching this goal have changed. So must the nature of the judiciary's vigilance in protecting civil rights adapt to these changes.

One such change which calls for increased judicial vigilance is the move from court-imposed remedies in fully-litigated cases to voluntary settlements of desegregation cases. Such voluntary settlements can occur in the class action suit context or in the procedural context

of a consent decree entered in a suit brought by the Justice Department against a local school board.

Voluntary settlements are favored by the courts because "the spirit of cooperation inherent in good faith settlement is essential to the true long-range success of any desegregation remedy." Armstrong v. Board of Sch. Directors, etc., 616 F.2d 305, 318 (7th Cir. 1980).

> A remedial decree reached through agreement between the parties may, because of the community cooperation it inspires, more effectively implement the constitutional guarantee of equal protection than a seemingly more stringent court-ordered remedy which the community views as imposed upon it from the outside.

Id. Courts should be extremely sensitive to the possibilities for abuse, though, where a compromise of the civil rights of a class is proposed. Id., at 317.

Therefore, in class action desegregation cases, hearings on proposed reme-

dies are almost universally held, and it may be an abuse of discretion not to conduct one. Mendoza v. United States, 623 F.2d 1338, 1348 n. 8 (9th Cir. 1980). Class members are notified of the proposed settlement and of the fairness hearing at which they and all interested persons have an opportunity to be heard. Armstrong, supra, at 314.

The purpose of such a hearing is to insure the opportunity for all relevant facts and objections to be placed before the court. The trial court must have sufficient facts before it to intelligently evaluate the settlement proposal. Mendoza, supra, at 1348; Armstrong, supra, at 314. The hearing assures that there are no unrepresented interests which are unfairly treated by the settlement. Absent class members are afforded an opportunity to come forward and make the court aware of any undisclosed inadequacies.

Mendoza, supra at 1348.

The Seventh Circuit in Armstrong, supra, went further to establish guidelines to ensure that federal courts reviewing class action settlements give due consideration to the public interests implicated in the suits before them. First, the importance of the substantive claims asserted in civil rights cases requires that both district courts and courts of appeals apply settlement principles with particular care and state their reasoning with particular clarity. Second, in considering a settlement the district judge must give constitutional claims the close scrutiny they deserve. Furthermore, no settlement should be approved which either initiates or authorizes the continuation of clearly illegal conduct. Armstrong, supra at 319.

The principles and guidelines established by the courts to govern the settlement of class action desegregation suits should be no less applicable in the

settlement of non-class action desegregation suits. Just as the named class representatives are presumed to adequately represent all class members in the class action context, so in the non-class action context where the Justice Department brings suit is it presumed to adequately represent the interests of the public. Yet because representative suits carry with them inherent dangers of conflict and compromise of absentee interests, courts in both contexts must be well informed of the views of objectors, and serve as a guardian of absentee interests. Mendoza, supra at 1346. If the settlement embodied in a consent decree entered into by the Justice Department and a local school board is to foster the same cooperative desegregation spirit as that thought to stem from class action settlements, procedures must be adopted which ensure that the interests of all those affected as well as the interests of

the community as a whole be heard and considered. Only maximum public participation will inspire community cooperation.

In the present case a voluntary settlement was reached by the Justice Department and the South Bend Community School Board (hereinafter SBCSC) in a non-class action suit instituted by the Justice Department. This settlement was embodied in a consent decree which was approved by the District Court based only on information provided it by the SBCSC. When two different groups sought intervention to raise their objections to the desegregation plan, they were denied intervention because it was presumed that the Justice Department and SBCSC adequately represented any objectors' interests. Petitioners then raised their objections to the plan in a separate lawsuit. In their class action suit Petitioners raised substantial constitutional claims. They

alleged facts which, if they had been given an opportunity to prove, would have shown that the desegregation plan adopted by the school board was unconstitutional, unlawful, against public policy and unreasonable. Petitioners were never afforded this opportunity. Petitioners were never given a trial on the merits of their claims. Nor were they even given an opportunity to be heard or present any evidence supporting their claims. This was because their suit, on the motion of the defendant SBCSC, was consolidated with the Justice Department's suit and Petitioners were thereafter treated as petitioners for intervention. No authority or justification for treating Petitioners as would-be-intervenors was given by the District Court and the Court of Appeals refused to rule on the appropriateness of this move. (Indeed, the Court of Appeals was under the mistaken impression that Petitioners had sought to have their complaint treated

as a petition for intervention). Yet it was this procedural step, coupled with the District Court's failure to apply the settlement principles and guidelines enunciated by the Seventh Circuit in Armstrong, supra, which worked to deny Petitioners any meaningful access to the courts to seek redress of the violation of their civil rights.

The District Court may have been persuaded by Fifth Circuit law which requires objectors to consent decrees entered in school desegregation cases to seek intervention. Adams v. Baldwin County Bd. of Educ., 628 F.2d 895 (5th Cir. 1980). Even if intervention be determined the proper way for objectors to consent decrees to proceed, due process requires they be given an evidentiary hearing on the question of adequacy of representation. Adams v. Baldwin County, supra at 897; Jones v. Caddo Parish School Bd., 704 F.2d 206,222 (5th Cir. 1983).

In the present case the District Court allowed no such hearing. Furthermore, a statement by the Court of Appeals in its opinion in this case indicates that the Seventh Circuit does not limit objectors in school desegregation consent decree cases to the status of petitioners for intervention. See also, United States v. Board of Ed. of City of Chicago, 88 F.R.D. 679, 685 (N.D. Ill, E.D. 1981). Yet when Petitioners instituted an independent lawsuit the District Court construed their complaint as a petition for intervention. If this error goes unrecognized and stands uncorrected this case stands for the proposition that a school desegregation plan devised through voluntary means and entered in a consent decree is immune from constitutional attack.

Petitioners in the District Court sought to show that the desegregation plan adopted by the SBCSC involved the removal

of eleven out of twenty-eight grade schools the vast majority of which were either already racially balanced or easily capable of being racially balanced with minor changes. Furthermore, the plan carefully preserved the heavily black and heavily white schools leading to a situation where extensive busing was needed to achieve racial balance. Therefore, the entire integration plan will collapse when the artificial paste of extensive busing is removed and South Bend will be left a city polarized as never before.

Petitioners also offered evidence from an expert witness to the effect that the general consensus among experts on the subject is that any school desegregation plan that fails to exempt from busing neighborhoods and schools that approximate the district-wide racial composition is likely to increase rather than decrease the overall level of racial segregation in

the community undermining existing integrated neighborhoods and reducing the incentives to achieve integration elsewhere.

These facts, coupled with the fact that school closings in the past twenty years of South Bend's history have almost always involved schools which were becoming increasingly integrated, and the fact that the desegregation plan requires 150% more blacks be bused compared to 4% more whites, could clearly indicate that an invidious discriminatory purpose was a motivating factor behind the adoption of this plan. Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 266 (1977). Yet the District Court undertook no inquiry, let alone a "sensitive inquiry" as demanded by Arlington Heights, supra, into the evidence of intent offered by the Petitioners.

In its haste to guarantee that the local school board be allowed to orderly

and efficiently (achieve) final and complete implementation of the Desegregation Plan" and to protect the school board from spending "substantial time and expense defending the Plan," the District Court was derelict in its duty to protect the constitutional rights of the persons represented by Petitioners, as well as the constitutional rights of all other persons impacted by the South Bend public school system.

As stated by a sister court within the Seventh Circuit, in response to the "implication, expressed more than once by counsel for the local school board," in a procedural context identical to this, that the Court play only a limited role:

> This Court does not view itself as a passive receptacle for the Board's desegregation plan, to respond in a Pavlovian way only if the bell is rung by a stated disagreement between the Board and the United States. It has not abdicated its constitutional responsibilities, and if the litigants were to agree on a plan that

> did not conform to the Constitution this Court would reject that plan and send the parties back to the drawing board.

United States v. Board of Ed. of City of Chicago, supra at 687. (Original emphasis) (Footnotes omitted). The District Court in that case noted that the Assistant Attorney General assigned to the case recognized that to the extent third parties wished to be heard, they would have that right, not only before the school board, but before the Court as well. Id. To the contrary, in this case, the District Court felt it was sufficient that Petitioners "ha(d) had (their) day before the Board of School Trustees."

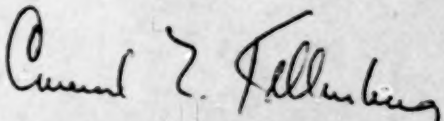
District courts cannot delegate to local school boards the duty and responsibility of determining the constitutionality of the plans they submit. Yet that is the consequence of the District Court's actions in this case. Such an egregious constitu-

tional wrong cannot be allowed to stand.

CONCLUSION

If voluntary desegregation efforts are to inspire the community cooperation thought to justify their use, third parties must have a meaningful opportunity to be heard. District courts cannot allow themselves to become vehicles for local school boards to use to reestablish dual school systems. Such a result is possible if courts, such as the District Court in this case, deny objectors a hearing on their constitutional claims. For the reasons discussed in this brief, amicus respectfully requests this Court to grant the writ of certiorari petitioned for in this case.

Respectfully submitted,



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